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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ———

FRANK SCHULTE, WM. J. SCHULTE and FIRST NATIONAL BANK & TRUST COMPANY OF OKLAHOMA CITY, as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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June, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 1971

No. ————

FRANK SCHULTE, WM. J. SCHULTE and FIRST NATIONAL BANK & TRUST COMPANY OF OKLAHOMA CITY, as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The Petitioners, Frank Schulte, Wm. J. Schulte and First National Bank & Trust Company of Oklahoma City, as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Oklahoma entered in this proceeding on the merits hereof on January 19, 1972, and the decision of said Court summarily overruling Petitioners' Petition for Rehearing on March 21, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma appears in Appendix A, hereto, and is reported in 494 P.2d 638. The opinion of the Court of Appeals of the State of Oklahoma, Division 1, appears in Appendix B, hereto.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on January 19, 1972. A timely petition for rehearing was denied on March 21, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether in the trial of condemnation proceedings, the condemning authority may capitalize upon and take advantage of "pre-condemnation blight," *i.e.*, the value-depressing effects of pre-condemnation public knowledge of a public improvement, without violating the rights and liberties guaranteed to the landowner under the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions directly involved, but 42 U.S.C. §4638(3) is indirectly involved, in that petitioners contend that the decision of the Oklahoma Supreme Court herein complained of permits condemning authorities in Oklahoma to circumvent said statute and its implementing legislation in Oklahoma, 27 O.S. 1971 §13(3). 42 U.S.C. §4638(3) provides in pertinent part:

> "Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than

that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property."

STATEMENT OF THE CASE

Petitioners were the owners of a 160-acre tract of land located in the southwest corner of Oklahoma City, Oklahoma. This property was condemned by the respondent, the City of Oklahoma City, for use in connection with the expansion of Will Rogers World Airport. This airport expansion project was a federal grant-in-aid program carried out by the respondent in cooperation with the Federal Aviation Administration.

Under Oklahoma condemnation procedure, the district court appoints three disinterested freeholders to act as commissioners for the purpose of appraising the land being condemned and assessing the landowners' damages. The court-appointed commissioners in this case set petitioners' recovery at $340,000.00. Both parties are entitled to demand a jury trial within 60 days of the filing of the commissioners' report. The respondent filed a timely demand for jury trial, as did petitioners, in order to protect themselves from summary withdrawal by respondent; and the case was tried to a jury in the District Court of Oklahoma County (state court, which, on March 19, 1968, resulted in a jury verdict reducing the commissioners' award by $84,000.00 (from $340,000.00 down to $256,000.00 or $1,600.00 per acre).

During the trial of the case, respondent introduced evidence of a comparable sale from within the airport expansion area and in very close proximity to the subject prop-

erty. This sale, "Atkings to Fry," reflected a very low market value of $1,000.00 per acre. See C-M. 352, 353 and 354. Respondent's other comparable sales were located in fringe areas of Oklahoma City, well beyond the developed portion of the Oklahoma City metropolitan area. The trial court refused to permit the petitioners the opportunity of introducing evidence, both documentary and oral, which would have explained the fact that the market in the area of the subject had been depressed by advance public knowledge of the airport expansion. At C-M. 255, the trial court prevented petitioners' value witness Berwin from testifying as to his reasons for selecting his comparable sales from developed areas outside the airport expansion areas. At C-M. 256, the trial court excluded documentary evidence tendered by petitioners as Exhibits Numbers 5-16, which were the official records and the master plan of Will Rogers Airport long prior to the date of taking (February, 1963), showing the petitioners' property within the expansion area. At case-made pages 308, 310, 311 and 312, petitioners were denied the opportunity of introducing Exhibits 17 and 18. Exhibit 17 was a resolution of the City Council of Oklahoma City under date of March 20, 1962, officially declaring respondent's intention to acquire certain lands for the airport expansion area, including, *inter alia*, petitioners' land. Exhibit 18 was a similar resolution of the City Council announcing the respondent's intention of taking all of the land "west of the West Bypass," which included petitioners' land. The net result of exclusion of this category of evidence by the trial court was to permit the respondent to use comparable sales from within the airport expansion area and in other undeveloped portions of Oklahoma City

without giving petitioners an opportunity to explain to the jury why those sales reflected a depressed market value for their land.

The petitioners appealed the jury verdict to the Supreme Court of Oklahoma, urging as error the exclusion of the aforementioned evidence. The Supreme Court of Oklahoma in turn assigned the case to the Court of Appeals, Division 1, a three-judge intermediate appellate court, which, under current Oklahoma appellate procedure hears cases on assignment from the regular docket of the Supreme Court. The Court of Appeals sustained petitioners' appeal, holding:

> "As revealed by the record herein, there were repeated exclusions of documentary and oral evidence offered by the defendants (petitioners) to show that the City had publicized for many years that it was going to condemn the land involved, and that as a result, the land values in the area had been depressed. It is the opinion of this Court that the defendants were thereby deprived of a fundamental right to prove their legitimate theory of damages, which was highly prejudicial and reversible error." *Schulte, et al.* v. *Oklahoma City*, 42 O.B.A.J. 1201 (Okla.Ct.App. 1971).

The respondent's application in the Supreme Court of Oklahoma for a writ of certiorari to review the decision of the Court of Appeals, Division 1, was granted; and, on January 19, 1972, the Supreme Court of Oklahoma reversed the Court of Appeals and remanded the case to the trial court with instructions to enter judgment against petitioners upon the jury verdict in the amount of $84,000.00. A timely petition for rehearing was filed, same being overruled on March 21, 1972. The Supreme Court of Oklahoma

reversed the Court of Appeals on the sole ground that petitioners' "expert witnesses were not prevented from testifying as to the value of the property as it would have been at the time of taking of it had it not been subjected to threat of condemnation and was not being taken." The petition for rehearing was summarily overruled without opinion.

REASONS FOR GRANTING THE WRIT

1.

A LANDOWNER'S RIGHT TO JUST COMPENSATION FOR THE TAKING OF HIS PROPERTY FOR PUBLIC USE IS A RIGHT GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. THE DECISION BELOW RAISES A SIGNIFICANT THREAT THAT OKLAHOMA CONDEMNING AUTHORITIES WILL USE "PRE-CONDEMNATION BLIGHT" AS A TOOL OF CONFISCATION.

The term, "pre-condemnation blight," is fortunately a rather new term in the law of eminent domain. In the past, public improvements have generally been looked upon favorably by the community in which they were to be constructed. The result was that market values in the community were enhanced by the optomistic dealings of speculators and developers hoping to capitalize on the anticipated economic benefits to be derived from the public improvement. Today, this is the exception rather than the rule. Massive urban renewal projects which hold vast areas of many metropolitan centers in a state of economic limbo, awaiting wholesale condemnation, are occurring by the hundreds. Thousands of miles of super highways which sever communities, disrupt and relocate tens of thousands

of people from their homes, destroy going businesses by curtailment or elimination of access to traffic, and envelop vast urban areas of this country in noise, air pollution and confusion, are the order of the day. Enormous flood control and reservoir projects which destine gigantic areas of our countryside to eventual inundation are being developed in many places in our state alone; hundreds, perhaps thousands, are scheduled elsewhere. Large airports, such as Will Rogers Airport, are being constructed in areas which are not particularly fond of the bellicose rumblings regurgitated from huge jet aircraft, the crowds, traffic, noise and confusion that accompany such public "improvements." The net result is that the optimism that once preceded the construction of public improvements has given way to opposition, alarm and fear in the areas in which they are to be built. Speculators and developers, particularly those engaged in residential development, avoid such areas. The problem is complicated by the fact that most public improvements today are funded either entirely or in part under federal grant-in-aid programs which involve years of preliminary discussion, planning, red tape and public hearings. Thus, long periods of time between conception of the idea and actual construction of the project nearly always occur. It is during this period of time that property values suffer and "pre-condemnation blight" sets in. Most state courts and all of the federal court decisions we have discovered in our research on the subject flatly prohibit condemning authorities from penalizing property owners with an artificially depressed market. However, the decision below countenances, approves and sanctions exactly this type of governmental confiscation. The Oklahoma Supreme

Court has decreed that as long as the landowner's witnesses testify to a value the property would have had, had there been no threat of condemnation or preliminary discussion of the project, the landowner cannot complain if the condemning authority pitches its whole case on a depressed market! Simply stated, the landowner's witnesses are permitted to give their valuation but are precluded from explaining to the jury that the reason for disparity between their figures and actual sales that have occurred around the perimeter of the condemnation has been due to "pre-condemnation blight." With an actual sale obviously more convincing than an unsupported estimate of value, the landowners are under a hopeless disadvantage. If, as in the instant case, the condemning authority predicates its value testimony on the market depression but conveniently avoids mentioning it, and prevents the landowner (with the trial court's blessing) from exposing it, the jury will believe the condemnor's evidence, based upon the actual sale next door. The forcing of such a distorted picture of value would indicate a denial of due process to the property owner.

It has been consistently held that the condemning authority is not entitled to take advantage of a depressed market which has resulted from prior public knowledge of a public improvement, in assessing the landowner's compensation. *United States* v. *74.60 Acres of Land*, 143 F.2d 143 (7 Cir. 1966); *City of Cleveland* v. *Carcione*, 118 Ohio Ops. 2d 53, 92 Ohio L. Abs. 464, 190 N.E.2d 52 (1963); *State* v. *Carswell*, 384 S.W.2d 408 (Tex. Civ. App. 1964); *St. Louis Electric Terminal Ry. Co.* v. *MacAdaras*, 257 Mo. 236, 166 S.W. 307 (Mo. 1914); *In re Twelfth Street*, 217 Pa. 362, 66

Atl. 568 (1907); *Lower Nueces River Water Supply Dist.* v. *Collins*, 357 S.W.2d 450 (Tex. Civ. App. 1962); *Housing and Redevelopment Authority* v. *Minnesota Met. Co.*, 141 N.W. 2d 130 (Minn. 1960); *State* v. *Hollis*, 379 P.2d 750 (Ariz. 1963); *Housing Authority of Decatur* v. *Schroeder*, 188 S.E.2d 148 (Ga. 1966).

2.

THE DECISION BELOW CONSTITUTES A CONFLICT IN PRINCIPLE WITH A PRIOR DECISION OF THIS COURT.

In the December 22, 1964, Report of the House Committee on Public Works on a study conducted on decreases in market values brought about by impending real property acquisition in federal and federally assisted programs, the following appears:

> "In some programs property values may decrease because of preliminary actions by public officials or the announcement of a proposed project and the prospect that the property probably will be taken for the project. Where this occurs several years before the actual taking, especially in urban areas, tenants move out or fail to renew their leases and new tenants cannot be obtained, buildings are abandoned, the neighborhood deteriorates or is deserted and vandalism sets in. By the time the property is taken, values frequently have decreased sharply. * * * It has been suggested however, that proper application of the *Miller rule* requires that all decreases in value of the property caused by the project be disregarded." (Emphasis supplied.)

The "Miller rule" mentioned above refers to the case of *United States* v. *Miller*, 317 U.S. 369, 63 S.Ct. 276, 87

L.Ed. 336, decided by this Court on January 4, 1943. In that case, the United States had condemned a strip across respondents' lands for the physical relocation of a railroad which had to be moved to accommodate the Central Valley Reclamation Project in the State of California. The record before the Court indicated that the public had had advance knowledge of this project for many years prior to the acquisition of respondent's property. The immediate area surrounding the reclamation project had experienced a "boom" in land values. The respondent's value witnesses were not permitted by the trial court to express their opinions of value as of the date of the filing of petitioner's complaint for the reason that respondents were not entitled to have included therein an increment of value due to the petitioner's authorization of and commitment to the project. After recovering an unfavorable verdict, the respondents appealed to the Circuit Court of Appeals, which reversed the District Court. The Government applied to this Court for certiorari, which was granted at 316 U.S. 657. In reversing the Circuit Court and reinstating the jury verdict, this Court held in an opinion by Mr. Justice Roberts:

> *"This case presents important questions respecting standards for valuing property taken for public use.* For this reason, and because of an apparent conflict with one of our decisions, we granted certiorari." (Emphasis supplied.)

The Court went on to rule that any increment of value attributable to the project should have been disregarded in assessing the respondents' compensation. Of course, this holding is not a conflict in decision, but one in principle. The Court found the question involved in *Miller* to be suf-

ficiently "important" to justify granting certiorari. Your petitioners respectfully submit that it is as important that landowners be treated with justice in condemnation cases as it is that the Government be treated with justice. It is no less important that the Government be prevented from realizing gain by reason of "pre-condemnation blight" than for the landowner to be prevented from experiencing a windfall on account of an enhanced value the Government created for his property. This Court has not yet addressed the former question.

3.

THE DECISION BELOW PROVIDES CONDEMNING AUTHORITIES IN THE STATE OF OKLAHOMA WITH A MEANS OF CIRCUMVENTING AN ACT OF CONGRESS.

42 U.S.C. §4651(3), which is a portion of the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, provides in pertinent part:

> "Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property."

This statute is applicable to any and all federal or federally assisted public projects.

The decision below generates injustice and sets binding precedent for the Oklahoma trial courts to follow. Condemning authorities in the State of Oklahoma will be per-

mitted to establish values based upon "pre-condemnation blight." As long as the landowner's value witnesses testify only to a market value which ignores such market depression, without the right to present the full picture, reversible error will not occur, and fictitious values will prevail. It is respectfully submitted that this Court should grant certriorari and ultimately reverse this case to prevent condemning authorities in Oklahoma from becoming equipped with a weapon of circumvention which will render §4651 (3) meaningless in our State.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Supreme Court.

Respectfully submitted,

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June, 1972

APPENDIX A

[494 P.2d 638]

Frank SCHULTE et al., Plaintiffs in Error,
v.
OKLAHOMA CITY, a municipal corporation,
Defendant in Error.

No. 43209.
Supreme Court of Oklahoma.
Jan. 18, 1972.

Rehearing Denied March 21, 1972.

The District Court, Oklahoma County, Jack R. Parr, J., entered judgment for condemnor and against landowners for difference with interest from date of verdict between commissioners' award, which had been deposited with court clerk and withdrawn by landowners, and jury's verdict, which was less than the commissioners' award, and landowners appealed. The Court of Appeals reversed and remanded with directions, and certiorari was granted. The Supreme Court, Lavender, J., held that where landowner's expert witnesses appraised property being taken for airport expansion as though it were outside the airport expansion area and was not being taken in condemnation, though they were not expressly asked on the witness stand to give their valuation on such a basis, and thus in effect testified as to the fair market value of the property as it would have been at the time of taking if there had been no threat of condemnation and if the property was not being taken, and where such testimony was given without any evidence of any public announcement or public knowledge of a plan by the city to acquire the property, and was received without objection, no evidence of such public announcement or public knowledge was needed, and, if any offer of proof of the landowners could be construed as an offer of such evidence, the rejection of such evidence was not prejudicial.

Decision of Court of Appeals reversed and judgment of District Court affirmed.

[APPENDIX]

1. Eminent Domain Key 262(5)

Where landowner's expert witnesses appraised property being taken for airport expansion as though it were outside the airport expansion area and was not being taken in condemnation, though they were not expressly asked on the witness stand to give their valuation on such a basis, and thus in effect testified as to the fair market value of the property as it would have been at the time of taking if there had been no threat of condemnation and if the property was not being taken, and where such testimony was given without any evidence of public announcement or public knowledge of a plan by the city to acquire the property, and was received without objection, no such evidence was needed and, if any offer of proof by the landowners could be construed as an offer of such evidence, the rejection of such evidence was not prejudicial. 12 O.S. 1971, § 78; 22 O.S. 1961, § 1068.

2. Eminent Domain Key 262(5)

In proceeding for contemnation of 160-acre tract of "raw" farm land located one-half mile from nearest developed tract, overruling of objection that condemnor's counsel was leading his witness by asking if "skip development" was not, sometimes, the result of people wanting to get out by themselves, if error, was not prejudicial error.

3. Eminent Domain Key 262(5)

In proceeding for condemnation of "raw" farm land located at least one-half mile from nearest water and sewer mains, overruling of landowners' objection that condemnor's witness had not been qualified to answer question as to whether fact that developer would have to construct lines to nearest available mains was factor considered by land developers in connection with possible purchase of a tract, if error, was not prejudicial error, particularly in view of fact that landowners' own witness had previously testified that it was such a factor.

4. Eminent Domain Key 262(5)

In condemnation proceeding, overruling of landowners' objection, on ground that witness' answer to question would be hearsay unless he were an engineer, to question whether sanitary sewers on tract involved could have been tied into sewer main one-half mile east of tract and used without installing lift pump, to which witness answered that they could not have been, as based upon his examination of topographic maps of area involved, if error, was not prejudicial error, particularly in view of fact that proffered rebuttal testimony of landowners' witness, who did not purport to be an engineer, would have been based upon his examination of topographic maps.

5. Eminent Domain Key 262(5)

In proceeding to condemn tract of "raw" farm land allegedly susceptible to commercial and residential development, in which condemnor's witness had testified that at least one lift pump would be required to connect sanitary sewers on the tract to sewer main one-half mile east, sustaining of objection, on ground that proffered testimony would not change testimony in chief, to proffered "rebuttal" testimony to the effect that such connection would require lift pump at cost of $15,000 above cost of development estimated by witness when testifying in chief but that lift pump would not be required to make connection to north of the tract, if error, was not prejudicial.

Appeal from the District Court of Oklahoma County; Jack R. Parr, Trial Judge.

Condemnation proceeding by City of Oklahoma City with trial by jury on question of just compensation. Jury's verdict was for less than the amount of the commissioners' award, which had been deposited with court clerk and withdrawn by landowners. Trial court entered judgment in favor of city and against landowners for difference with interest from date of verdict. After the overruling of their

motion for a new trial, the landowners appealed to this court. Cause was assigned by this court to the Court of Appeals, Division No. 1, for opinion. By its opinion, the Court of Appeals would reverse the judgment of the trial court and remand the cause with directions to grant a new trial. After the denial of its petition for rehearing by the Court of Appeals, the city petitioned this court for certiorari to review that court's decision.

Certiorari granted, decision of court of appeals reversed and judgment of trial court affirmed.

Fowler, Rucks, Baker, Jopling, Gramlich & Mee, McClelland, Collins, Sheehan, Bailey & Bailey, by William F. Collins, Jr., H. V. Scoggins, Jr., Oklahoma City, for plaintiffs in error.

Roy H. Semtner, Municipal Counselor, Walter M. Powell, Assistant Municipal Counselor, Oklahoma City, for defendant in error.

LAVENDER, Justice.

This appeal, from the District Court of Oklahoma County, involves matters of evidence in the jury trial of a condemnation proceeding brought by the City of Oklahoma City. The jury's verdict was for less than the amount of the commissioners' award, which had been deposited with the court clerk of the city and withdrawn by the landowners. The trial court entered judgment for the city and against the landowners for the difference, with interest from the date of the verdict. The landowners appealed to this court.

The condemnation proceeding was commenced, on December 3, 1962, by the defendant in error, City of Oklahoma City, pursuant to a resolution of necessity adopted by its City Council on March 20, 1962, to acquire title to the Southeast Quarter of Section 26, Township 11 North, Range 4 West, in Oklahoma County, for airport purposes and for the construction, operation and maintenance of an airport thereon, and uses incidental thereto.

Title to the 160-acre tract in question in the plaintiffs in error, Frank Schulte, Wm. J. Schulte, and The First National Bank and Trust Company of Oklahoma City as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman, is not questioned, and the city's right to take the title to the tract is not questioned. According to the pre-trial order, damages to property not taken are not involved.

Commissioners appointed by a judge of the district court reported the total damages to these landowners as a result of the taking of this tract to be $340,000.00. Demands for a trial by jury on the question of just compensation were filed upon behalf of the city and upon behalf of these landowners. The amount of the commissioners' award was paid into the office of the court clerk by the city for the benefit of these owners on February 13, 1963, and was disbursed to them on January 3, 1964, after they withdrew their objections to the right of the city to take a fee title to the entire tract.

Jury trial resulted in a verdict for these landowners in the amount of $256,000.00. Based on that verdict and the landowners' withdrawal of the $340,000.00 award money, the trial court entered judgment for the city and against the landowners in the amount of $84,000.00, with interest thereon at the rate of six per cent per annum from the date of the verdict (March 21, 1968).

On appeal, the landowners present their assignments of error under three propositions. The first two propositions involve the same legal theory and are argued together:

1. "The trial court erred in refusing the introduction into evidence of testimony and documents to show the value of the property as it would have been if no airport expansion had been contemplated or announced."

2. "The trial court erred in refusing to allow witnesses to testify as to public knowledge and personal knowledge of the announced and impending condemnation."

They do not question this court's many decisions to the effect that, when private property is taken for public purposes, just compensation is the fair market value of the property as of the time of the taking, which, when the amount of the commissioners' award is paid into the court clerk's office for the benefit of the landowners, is the date such deposit is made—in this instance, February 13, 1963.

Their theory is that, if the value of the property as of the time of the taking has been depressed by the condemnor's prior announcement that the property would be taken for public use, the principles of just compensation for property so taken require that the landowner receive what its fair market value would be, at the time of the taking, if it had not been subject to the threat of condemnation and was not being taken.

The landowners do not cite any Oklahoma case in support of this theory. They do cite cases from five other states (Arizona, Florida, Georgia, Minnesota, and Texas) which would support the principle that a condemnor cannot take advantage of a depressed valuation which results from its own acts.

The cited Florida case, State Road Department of Florida v. Chicone et al. (1963), 158 So.2d 753, is the one most nearly in point on the facts contended for by the landowners herein, and does support the principle of law relied upon by them.

In that case, the Florida Road Department had publicly announced, in 1957, the route for an interstate highway through the City of Orlando. Four of the parcels required for the announced right-of-way were owned by the appellees and, at the time of the announcement, had improvements thereon, all of which were leased out to others. Proceedings to condemn those parcels were not commenced until May 10, 1960 (the time of taking, under the Florida decisions). Expert witnesses for the Department stated that their valuations as of May 10, 1960, reflected a discount

from the value as of the date the announcement had been made, based upon the resulting decrease in the rental value of the property in the interim. The trial court refused to strike their testimony as to value, but later granted the landowners a new trial because of error in doing so. A District Court of Appeal affirmed the trial court in granting a new trial, and, on certiorari to review the decision of the Court of Appeal, the Supreme Court of Florida held that the result was correct.

In doing so, the Supreme Court of Florida concluded that the value of the property taken at the time of the taking, as depreciated or depressed by the prospect of condemnation, is not a proper basis or measure of compensation for the property taken. It held that, in such circumstances, compensation should be based on the value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken.

[1] In the present case, it is not necessary for us to determine whether or not those principles of law would be applicable in Oklahoma. Contrary to the landowners' contention, their expert witnesses concerning value of the property taken were not prevented from testifying as to the value of the property as it would have been at the time of the taking if it had not been subjected to the threat of condemnation and was not being taken. Those were the valuations they gave, and those valuations were given without the landowners having been required to show public knowledge that this land would be condemned, or even a public announcement that it would be taken.

As of the date of the taking (February 13, 1963), the 160-acre tract of land involved herein was "raw" farm land with no buildings thereon, and, except for a very few years when it had been farmed by Frank Schulte or by Wm. J. Schulte, had been leased to others for agricultural purposes. It had not been developed, or even platted for de-

velopment, at that time. It was abutted on the south by a gravel county road known as Southwest 74th Street, and on the east by a hard-topped county road known as South Portland, both of which were extensions of Oklahoma City streets with the same names.

One witness for the landowners, Leslie Judd (mentioned later on connection with the landowners' third proposition), who had been a real estate "planner" for more than twenty years in the Oklahoma City metropolitan area, testified that the entire tract was generally flat and level and was well adapted for development for residential and commercial purposes; that, shortly before the trial, he had prepared a plat of the tract, on which he set aside 18 acres at the intersection of 74th and Portland for commercial purposes and divided the remaining 142 acres into blocks and lots; and that, in his opinion, the tract was ready for development as of February 13, 1963, even though the nearest developed tract was a half-mile away. He also testified that the cost of development, including the cost of paving the streets, installing water and sewer lines, and connecting them to the nearest available water and sewer mains, was a factor that would be considered by any one considering the purchase of a tract for such a development. He gave his estimates of the costs of developing the tract as set forth on his plat, including the cost, per running foot, for constructing water and sewer lines to the nearest available mains, which, he thought were a half-mile away, but might be a mile and a half away. His plat was received in evidence, and the landowners' expert witnesses concerning value of the tract applied their per-acre valuations for different purposes on the basis of his division between commercial and residential purposes.

The landowners' counsel asked each of their three expert witnesses concerning value if he had an opinion as to the fair market value of this tract as of February 13, 1963. Receiving an affirmative answer, he asked each of these experts for his opinion as to such value and what he had

considered in arriving at his estimate of such value. Each had considered sales, made between August 24, 1959, and July 19, 1965, of tracts of "raw" land that he considered to "comparable" properties, which varied in size from 1.03 acres to 305 acres and in location from one-half mile to three and one-half miles from this tract of land, and had made adjustments for differences between the tracts with respect to various pertinent factors, such as terrain, disance from existing water and sanitary sewer mains, frontage on a main thoroughfare, distance from central Oklahoma City, and proximity to the on and off ramps of a nearby interstate highway.

In selecting sales of comparable properties to be considered in estimating the fair market value of this tract, each of these witnesses purposely considered only properties outside the Will Rogers Airport expansion area. None of them mentioned the threat, and lack of threat, of condemnation as factors to be considered in making such a comparison. On cross-examination, one of them stated that he had not considered a particular sale mentioned by the city's counsel because, at the time of the sale, it was public knowledge that that tract was going to be taken by the city for the airport expansion. An additional question concerning that tract brought forth a statement by the landowners' counsel, not denied by the city's counsel, that it had been agreed that sales of land within the airport expansion area would not be used for valuation purposes. Thus, these witnesses appraised this property as though it were outside the airport expansion area and was not being taken in condemnation.

Although not expressly asked, on the witness stand, to give their valuation of the property in question on such a basis, the witnesses' opinions as to value were on the basis of the measure of compensation stated in the above-cited Florida case.

The trial court did not refuse to allow any witness for the landowners to testify as to the fair market value of this property as it would have been at the time of the taking if there had been no threat of condemnation and the property was not being taken. Their opinions as to value were given, and received in evidence, on that basis, without objection and without any evidence of any public announcement, or public knowledge, of a plan by the city to acquire this property, by condemnation if necessary, for airport expansion purposes. We find no offer by the landowners of any testimony as to such a public announcement or public knowledge. In the circumstances, no evidence of such a public announcement or public knowledge was needed.

If any offer of proof made by the landowners can be construed as an offer of evidence of such a public announcement, or public knowledge, of such a plan by the city, the rejection of such evidence was not prejudicial to the landowners.

This last-mentioned statement also applies to the landowners' Exhibits Nos. 5 through 16, and 17 and 18, involved in their first proposition. Insofar as possibly pertinent to the landowners' first and second propositions, their Exhibits 5 through 16 (as excerpted in the case-made, with some of them not included at all) would show no more than that, according to the city's official records, the City of Oklahoma City had some plans, as early as April 51, 1958, for the ultimate inclusion of this tract of land in its Will Rogers Airport, but, of themselves, would not indicate any public announcement, or public knowledge, of such a plan. Exhibit 17, which is a certified copy of the resolution of necessity adopted by the City Council of Oklahoma City on March 20 1962 (referred to in the city's petition in condemnation), would, insofar as possibly pertinent hereto, show no more than that, as of March 20, the city intended to acquire, as quickly as possible and by condemnation if necessary, the tract of land involved herein, and other lands in the vicinity

thereof, for airport purposes. No portion of the landowners' Exhibit 18 appears in the case-made.

The landowners' first and second propositions must be denied. 12 O.S.1961 § 78; 22 O.S.1961 § 1068.

The landowners' remaining proposition is to the effect that the trial court erred in allowing witnesses for the city, who had qualified only as licensed real estate brokers and professional real estate appraisers, to testify, over the landowners' objections, concerning engineering aspects of the development of real estate and the costs thereof, and in refusing the landowners' offer of testimony in rebuttal thereof.

The first portion of the proposition involves the city's witnesses Howard Sears and Frank Grass. The latter portion involves the landowners' witness Leslie Judd, who prepared a plat for the development of the tract in question and testified concerning the costs of such development as of February 13, 1963, as hereinabove mentioned.

The landowners made only one objection during the examination of Mr. Grass. It was an objection to his testifying concerning a particular sale transaction and was sustained.

They made four objections during the testimony of Mr. Sears. One of them was to an answer as not being responsive to the question asked, and was sustained. The trial court did overrule their other three objections.

[2] One of those objections was to the city's counsel leading the witness by asking if "skip development" was not, sometimes, the result of people wanting to be out by themselves. If the overruling of that objection was error, it was not prejudicial error.

[3] Another one of those objections was that the witness had not been qualified to answer a question as to whether or not the fact that water and sewer mains had

not yet been extended all the way out to a tract of land, so that a developer would have to construct water and sewer lines to the nearest available mains, was a factor considered by land developers in connection with a possible purchase of a tract of land for development purposes. Particularly in view of the fact that the landowners' own witness Judd (and one or more of their experts on value) had previously testified that it was such a factor, the overruling of that objection, if error, was not prejudicial error.

[4] The other objection assumed that the witness' answer to a question would be hearsay unless he were an engineer. The question was whether or not, in view of the elevations involved, sanitary sewers on the tract involved herein could have been tied into the sewer main at the "Madole" tract, one-half mile east of this tract, and be used without installing at least one lift pump. The witness' answer that, in his opinion, they could not have been was based upon his examination of topographic maps of the area involved. Particularly in view of the fact that the testimony of the landowners' witness Judd (who did not purport to be an engineer), offered in rebuttal, would have been based upon his examination of topographic maps and sewer plans in the office of the City Engineer of Oklahoma City, rather than upon his personal knowledge of the elevations involved, the overruling of this objection, if error, was not prejudicial error.

[5] Mr. Judd was recalled to the stand by the landowners, as a rebuttal witness, and was asked if he had, at counsel's request, made a check to determine whether the sewer main at the "Madole" tract could be tied into or would it be necessary to go north a mile and a half with a sewer line in order to develop the tract involved herein. He answered that he had checked the records just mentioned above, and, when asked by the city's counsel if he had checked with any department of the city to find out if the city would have allowed such a connection at the "Madole" tract, answered that he had not. After the court

had sustained the city's objection to his testifying about the matter of connections to the city's mains, in view of his prior testimony on the matter and his lack of knowledge as to whether the city would have permitted a connection at the "Madole" tract, the landowners' counsel offered to prove by Mr. Judd that he had checked the engineering and that using the sewer main at the "Madole" tract would require a lift pump, which would cost an additional $15,000 and increase the total cost of development, as estimated by him when testifying in chief, by that much, but if they had to go to the north of the tract involved herein, a lift pump would not be required. The trial court sustained an objection to the effect that such testimony would not change his testimony in chief.

The proffered "rebuttal" testimony of Mr. Judd would only serve to increase his prior estimate of the total cost of developing the tract in question if the city would have allowed the sanitary sewers on this tract to be connected to the city's sewer main at the "Madole" tract, using a lift pump. The sustaining of the city's objection to such proffered testimony, if error, was not prejudicial to the landowners.

Their third proposition cannot be sustained.

The decision of the Court of Appeals is reversed and the judgment of the district court is affirmed.

All of the justices concur.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA
(Division No. 1)

FILED
COURT OF APPEALS
OF OKLAHOMA
APR 29 1971
ANDY PAYNE
CLERK

FRANK SCHULTE, WM. J. SCHULTE and FIRST NATIONAL BANK & TRUST COMPANY OF OKLAHOMA CITY as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman,	)	
Plaintiffs in Error,	)	
vs.	)	No. 43209
THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Defendant in Error.	)	

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA
HONORABLE JACK R. PARR, JUDGE

REVERSED

Fowler, Rucks, Baker, Jopling,
Gramlich & Mee
Oklahoma City, Oklahoma

McClelland, Collins, Sheehan,
Bailey & Bailey
William F. Collins, Jr.
Oklahoma City, Oklahoma — For Plaintiffs in Error.

Roy H. Semtner and
Walter M. Powell
Oklahoma City, Oklahoma For Defendant in Error.

ROMANG, J.:

The City of Oklahoma City, a municipal corporation, was plaintiff in the trial court; and Frank Schulte, Wm. J. Schulte and First National Bank & Trust Company of Oklahoma City as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bolman were the defendants. Reference will be made to said parties as they appeared in the trial court.

Oklahoma City brought suit for condemnation of defendant's 160 acres of land to be used in the expansion of Will Rogers World Airport. The commissioners' award of $340,000.00 was deposited in the court. The case was tried before a jury which returned a verdict of $256,000.00, and the defendants have appealed.

Defendants state that the City had published master plans over a period of many years for the expansion of the airport, and, as a result of the pending airport expansion, the property values in the immediate area did not increase as rapidly as they would have if the City had not publicized its plans to condemn the property.

Defendants allege that on several occasions in chambers and before the bench they called the court's attention to the evidence they wished to present in support of their theory of damages, but the court refused to permit defendants' witnesses to testify as to public or personal knowledge concerning the impending condemnation of the property, and the trial court refused to admit documentary evidence as to the airport master plans. In the brief of the defendants is the following:

> "The essence of defendant's argument is that plaintiff, through publication of its plans to condemn the property in question and that surrounding it, adversely affected the appreciation in value of the property and

should not be allowed to take advantage of its actions to acquire the property at a depressed value."

* * * * * *

"* * * the jury should have been allowed to hear and consider evidence that the proposed condemnation was publicized several years before the date of actual taking and that this publication adversely affected land values in the area, including the value of defendants' land."

The City maintains that the admissibility of that type of evidence rests in the sound discretion of the trial court.

There appears to be no reported Oklahoma case dealing with the admissibility of evidence to show that the condemnor had caused a depression of the market value prior to taking.

In the case of Housing and Redevelopment Authority v. Minnesota Met. Co., 141 N.W.2d 130 (Minn. 1956), the court said:

"* * * If the owner was precluded from showing the prior character of the neighborhood and its favorable economic potential prior to the taking, it would, by eliminating a significant element affecting market value, permit the condemnor to benefit by the act of condemnation in denying the owner just compensation."

In State Road Department v. Chicone, 158 So.2d 753 (Fla. 1963), is the following:

"The value of property at the time of taking as depreciated or depressed by the prospect of condemnation is not proper basis for measurement of compensation for property taken; compensation should be based on the value of property as it would be at the time of taking if it had not been subject to debilitating threat of condemnation and was not being taken."

The above principles of law were recognized by the trial court as evidenced by Instruction No. 3 in the instant case which reads, in part, as follows:

> "If you find from the evidence that the knowledge of the proposed expansion of Will Rogers World Airport caused an increase in the fair marked value of the property, the City of Oklahoma City cannot be required to pay for the increase brought about by the knowledge of the pending improvement, but if you find from the evidence that such knowledge caused a decrease in the fair market value, the property owners cannot be required to suffer the loss in value caused by the pending public improvement."

The defendants offered into evidence the official records of the master plans of Will Rogers Airport "'49 through 63" showing the land that was to be taken. Upon objection by the plaintiff City, this evidence was excluded for the reason that "they (the plans) would have to contain incompetent, irrelevant and immaterial matter." An offer of proof was then made that the records would be used only to "show the maps and the actual land being taken," "and that much of the lands that they have asked questions about previously, under the Airport Plan, were contemplated for condemnation as early as 1959." From the case-made is the following:

> "BY MR. COLLINS: We also offer to prove that as a result of these maps and as a result of these acts taken by the City of Oklahoma City by accepting the reports and following them through that it has made a material depression on the land in the immediate vicinity of Will Rogers Airport.
>
> "BY THE COURT: The Court is of the opinion that these records couldn't possibly show that; therefore, they are inadmissible. Proceed."

29 Am. Jur. 2d Evidence § 839 reads, in part, as follows:

> "When documentary evidence is material and relevant to issues in a case on trial, the entire document may be introduced, although it contains also incompetent and irrelevant matters."

As revealed by the record herein, there were repeated exclusions of documentary and oral evidence offered by the defendants to show that the City had publicized for many years that it was going to condemn the land involved, and that as a result, the land values in the area had been depressed. It is the opinion of this court that the defendants were thereby deprived of a fundamental right to prove their legitimate theory of damages, which was highly prejudicial and reversible error.

For the reasons stated, the judgment is reversed with direction to grant a new trial.

BOX, P. J., BAILEY, J. CONCUR

FILE COPY

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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1643

FRANK SCHULTE, WM. J. SCHULTE and FIRST NATIONAL BANK & TRUST COMPANY OF OKLAHOMA CITY, as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

ROY H. SEMTNER
Municipal Counselor
WALTER M. POWELL
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

July, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0036

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TEXTBOOKS:

16 Am.Jur.2d, Con. Law, Sec. 115 8

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. ———

FRANK SCHULTE, WM. J. SCHULTE and FIRST NATIONAL BANK & TRUST COMPANY OF OKLAHOMA CITY, as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma appears in Appendix A of petitioners' Petition for Writ of Certiorari and is reported in 494 P.2d 638 and therefore is not repeated herein.

JURISDICTION

This Court does not have jurisdiction since the petitioners did not present a Federal question in their evidence in the trial court, nor in their original brief in the Oklahoma

Supreme Court, but presented a Federal question for the first time in their Petition for Rehearing to the Oklahoma Supreme Court. The judgment of the Oklahoma Supreme Court is on independent, non-federal grounds, sufficiently broad to sustain the decision.

QUESTIONS PRESENTED

1. Is the measure of damages in a condemnation proceeding in Oklahoma the fair market value at the date of taking and may the jury speculate as to what such value might be?

2. Is the burden upon one seeking admission of evidence to properly offer such evidence, and does the trial court have any burden to perfect such offer for one who does not properly offer same?

3. May a petitioner who does not state a Federal question in his brief to the Appellate Court raise a Federal question for the first time on Petition for Rehearing?

STATUTES INVOLVED

As conceded by petitioners in their petition before this Court there are no Oklahoma statutory provisions directly involved. Specifically no statutory provisions were cited by petitioners in the trial court or before the Oklahoma Supreme Court as being either directly or indirectly involved.

STATEMENT

In this action petitioners seek to vacate the final adjudication of condemnation proceedings concerning lands owned by them prior to the condemnation for Will Rogers World Airport expansion purposes by The City of Oklahoma City, respondent herein. At the trial of this case, a District Court jury determined the value of the subject property to be below the amount fixed by the court-appointed commissioners which resulted in a deficiency judgment in favor of the respondent.

Petitioners attempted to introduce certain evidence during the trial which was excluded by the court. One witness, Berwin, was examined as to values (C-M. 255). Respondent objected to the answer as not being responsive, but was overruled by the court (C-M. 256) contrary to petitioners' recollection (Petition for Writ, page 4). Petitioners then attempted to introduce their Exhibits 5 through 16 (C-M. 256, 257). The titles of these documents or reports as they were referred to, are lengthy and are listed in the Index of Exhibits (C-M. v.). Their titles reflect that they cover information about all Oklahoma City Airports and not just Will Rogers World Airport. Petitioners conceded that the maps of the Will Rogers World Airport property were the only portion of the records that were relevant (C-M. 257). Petitioners in their offers of proof (C-M. 257, 258, 308, 310, 311 and 312) did not attempt to separate the maps in question and make a separate offer of proof by offering copies of just the maps.

The court refused the admission of the Exhibits 5 through 16 in their complete form in which they were sub-

mitted. Petitioners' Exhibits 17 and 18 were also refused by the court. These exhibits were resolutions of necessity which had been passed by the Council of The City of Oklahoma City. Exhibit 17 is a resolution attached by respondent to its original petition. Petitioners contend (C-M. 309) that Exhibit 17 had not been attached to the petition by respondent and was not part of the record. C-M. 15 reflects the District Court Clerk's stamp showing that the instrument had been filed with and at the same time as the original petition of the respondent.

Exhibit 18 is a resolution which contained a cover letter from one of the City attorneys to the City Manager which was not a part of the resolution and which was objected to by respondent (C-M. 309) and sustained by the court. There was no attempt by petitioners to offer Exhibit 18 separately and without the attachment.

From the jury verdict the petitioners appealed to the Oklahoma Supreme Court. Thereafter the case was reassigned to the Court of Appeals, an intermediate three-Judge Appellate Court. From a decision of the Court of Appeals which reversed the District Court, the respondent sought certiorari to the Oklahoma Supreme Court. Thereafter on January 19, 1972, the Supreme Court of Oklahoma reversed the Court of Appeals and remanded the case to the trial court with instructions to enter judgment against the petitioners.

The Supreme Court of the State of Oklahoma, in reversing the Court of Appeals, found it unnecessary to discuss all of the errors of law raised by respondent City. Justice Lavender's opinion, concurred in by all Justices, does not involve Federal questions.

ARGUMENT

This case involves condemnation procedures in the State of Oklahoma. On Petition for Rehearing before the Supreme Court of Oklahoma, the petitioners tardily alleged a Federal question.

No Federal question is involved since there is no allegation that the provisions of the Oklahoma Constitution relating to condemnation actions are contrary to or in any manner contravene the United States Constitution.

Although the Court of Appeals ruled in favor of petitioners, the Oklahoma Supreme Court unanimously reversed the trial court and directed that the jury verdict in the trial court be reinstated, deciding the case entirely on local law and without reference to any Federal question. In its decision the Oklahoma Supreme Court found it unnecessary to consider all of the allegations of error raised by the respondent but decided the case basically upon a review of the record as to evidence admissibility and the introduction of certain evidence allowed by the trial court.

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners in their Petition for Rehearing to the Oklahoma Supreme Court allege that the court's opinion is in conflict with the Constitution of the United States alleging for the first time any possible Federal question; however, other than in their Petition for Writ before this Court and even then indirectly, petitioners have not pre-

viously contended that any provisions of the Oklahoma Constitution were contrary to or in conflict with similar provisions of the United States Constitution.

This case was litigated and decided entirely on local law, without reference to rights claimed under the Constitution of the United States.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway Company,* 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510:

> "1. The asserted right to just compensation for improvements in eminent domain proceedings does not necessarily present a question under U. S. Const., 14 Amend., so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state, denying such right, where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and Constitution, and the case might well have been litigated wholly upon local law."

Southwestern Bell Telephone Company v. *State of Oklahoma,* 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528:

> "2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal Question was actually decided, or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commissioners of Love County, Oklahoma*, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419:

> "A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

Hooker v. *City of Los Angeles*, 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395:

> "2. The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court.
>
> "3. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument."

The Oklahoma Supreme Court decided this case on independent non-federal grounds which are sufficiently broad to sustain the decision.

II.

PETITIONERS HAVE WAIVED THEIR RIGHT TO URGE A FEDERAL QUESTION.

In the trial court the petitioners presented their case based upon Oklahoma condemnation law without any specific reference to any article or section of the United States Constitution. No Federal question was raised.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway,* 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Cronwell v. Randell, 10 Pet. 368, 398, 9 L.ed. 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed. 535, Sup.Ct.Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed. 847, 850, 22 Sup.Ct. Rep. 605."

Beck v. *Washington,* 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, *Con. Law,* Section 115, states in part:

> ". . . An appellant who fails to argue a constitutional contention in his brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention. . . ."

The opinion of Justice Lavender for the Oklahoma Supreme Court (Petitioners' Petition for Writ—Appendix A) decided the case on adequate non-Federal grounds. The first discussion by petitioners of the United States Constitution or a Federal question was in their Petition for Rehearing.

St. Louis & San Francisco Railroad Company v. *Shepherd*, 40 Okla. 589, 139 Pac. 833, on appeal, 240 U.S. 240, 60 L.Ed. 622, 36 S.Ct. 274, holds:

> "1. A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Bilby v. *Stewart*, 55 Okla. 767, 153 Pac. 1173, on appeal, 246 U.S. 255, 62 L.Ed. 701, 38 S.Ct. 264, states:

> "Where plaintiffs in error did not raise any federal question until their second petition for rehearing, after the state Supreme Court had affirmed a judgment on an adequate nonfederal ground, the question was raised too late for consideration on writ of error sued out from the United States Supreme Court."

The Oklahoma Supreme Court denied the Petition for Rehearing without deciding the tardily alleged Federal questions, therefore, petitioners are precluded from urging a Federal question.

III.

THE DECISION IS CLEARLY CORRECT.

The Oklahoma Supreme Court thoroughly searched the record and at page 643 of its opinion reported in 494 P.2d 638, stated:

> "The trial court did not refuse to allow any witness for the landowners to testify as to the fair market value of this property as it would have been at the time of the taking if there had been no threat of condemnation and the property was not being taken. Their opinions as to value were given, and received in evidence, on that basis, without objection and without any evidence of any public announcement, or public knowledge, of a plan by the city to acquire this property, by condemnation if necessary, for airport expansion purposes. We find no offer by the landowners of any testimony as to such public announcement of public knowledge. In the circumstances, no evidence of such a public announcement or public announcement was needed.
>
> "If any offer of proof made by the landowners can be construed as an offer of evidence of such a public announcement, or public knowledge, of such a plan by the city, the rejection of such evidence was not prejudicial to the landowners."

As to the offer of proof made by petitioners, however, Oklahoma law follows the most practical rule by requiring counsel to make separate offers of proof. The City again cites the leading case of *Pittenhouse* v. *Johnson*, 17 P.2d 457, which states:

> "Where an offer of proof is made as a whole, and some of the facts are admissible, and others inadmis-

sible, the court is not bound to separate it and admit such parts as are competent, though, in its discretion, it may do so. The refusal to do so, however, *will not be error.*" (Emphasis supplied.)

That these were matters within the sound discretion of the trial judge, it is again urged.

IV.

THERE IS NO CONFLICT OF DECISION.

The cases cited by petitioners in their Proposition Number 1 of the petition deal with a depressed market. In the instant case, however, as was evident from the testimony, the area in question was an area of rising land values being traded in by speculators and developers. The announcement of the airport expansion, if anything, seemingly boosted the price. The petitioners' witness, Drews, testified to-wit:

"Q. Now when did you first become familiar with the values of the farms in this area?

A. Due to the rapid expansion, oh, along about 1959 and '60. I was farming a considerable amount of land out there and the land was sold for development purposes" (C-M. 174).

The Supreme Court of Oklahoma in an early decision, in considering the question of speculation in determining fair market value in the case of *Blincoe* v. *Choctaw, O. & W. R. Co.*, 16 Okla. 286, 83 Pac. 903, approved the following jury instruction:

"The law does not permit you to fix speculative, boom, or fancy values upon the property in contro-

versy, but the law requires you to determine the reasonable market salable value of the property if the owner was offering to sell on usual terms and a purchaser desired to pay—is not erroneous because of the use of the word 'boom' as here used; the court having in this and other instructions been careful to advise and instruct the jury that the market value as contradistinguished from a purely imaginative or speculative value must be their basis for the assessment of damages."

The value of land in the entire area increased from 1959 through 1963 as was testified to by the appraisers for both petitioners and respondent. If anything, evidence of increase due to the announcement of airport expansion plans should not have been allowed if same had been objected to by respondent.

Petitioner has cited *United States* v. *Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, as being in conflict with the decision of the Oklahoma Supreme Court. There is no conflict however. In the instant case there was an increase in value which, applying the principle of the *Miller* case, if evidence had been introduced concerning a public announcement occurring several years prior to the taking, the landowner should not have benefited from an increase in value of the property that had occurred prior to the date of taking between the years 1959-1963.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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